

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 18-CR-0204(NGG)  
:  
:  
-against- : United States Courthouse  
:  
:  
May 6, 2019  
9:30 a.m.  
KEITH RANIERE, :  
:  
Defendant. :  
- - - - - X

REDACTED TRANSCRIPT OF CRIMINAL CAUSE FOR JURY SELECTION  
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS  
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings

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1 (In open court.)

2 THE COURTROOM DEPUTY: Case on trial.

3 MS. PENZA: Moira Penza, Tanya Hajjar, and Mark  
4 Lesko for the United States. Good morning, Your Honor. Also  
5 at counsel table is Special Agent Michael Weniger of the FBI.

6 THE COURT: Good morning.

7 MR. AGNIFILO: Good morning, Your Honor. We changed  
8 our configuration so I can see the witnesses better.

9 THE COURT: That's fine.

10 MR. AGNIFILO: Mark Agnifilo, Teny Geragos, Paul  
11 DerOhannesian, Danielle Smith for Keith Raniere, who is to my  
12 right.

13 THE COURT: Good morning, everyone. Please be  
14 seated.

15 All the jurors are here, I understand, and they will  
16 be brought up in a couple of minutes. I have a motion filed  
17 under seal by the Government dated today, May 6th, 2019.

18 Have you received it?

19 MR. AGNIFILO: We've received it. I haven't had a  
20 chance to look at it, though, Judge.

21 THE COURT: Okay. So I will need a response from  
22 you today by four o'clock this afternoon because it relates to  
23 tomorrow.

24 MR. AGNIFILO: I know. I can certainly give a  
25 verbal response probably before -- I know what the subject is

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1 because Ms. Penza and I discussed it on Saturday, and then I  
2 can -- my concern, Judge, is after we have our proceedings  
3 today, I have a client who has been brought here from Malaysia  
4 who had to be brought to the country today.

5 THE COURT: Is this person testifying tomorrow?

6 MR. AGNIFILO: No.

7 THE COURT: This is a different case?

8 MR. AGNIFILO: It's a different case.

9 THE COURT: Oh, okay. Before some other judge.

10 MR. AGNIFILO: In front of some other judge.

11 THE COURT: I see. Well, I can do it in chambers  
12 and seal it if that's how you want to handle it.

13 MR. AGNIFILO: That's certainly fine with us.

14 THE COURT: And if I have to issue an opinion, I  
15 will issue it at some later date.

16 MR. AGNIFILO: Very good. That's fine.

17 MS. PENZA: That's fine, Your Honor.

18 THE COURT: Well, the way we are going to handle  
19 today is that we're going to bring the jurors in, we're going  
20 to handle the final challenges, the peremptory challenges.  
21 You all have the form that I use, yes/no?

22 MR. AGNIFILO: I haven't seen that, Judge.

23 MS. PENZA: We don't have it, Your Honor.

24 THE COURT: We have it, so why don't we distribute  
25 it.

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1 THE CLERK: Sure.

2 THE COURT: And take a look at it momentarily.

3 (Pause.)

4 THE COURT: There are ten peremptory challenges for  
5 the jury, for the defense, and there are six for the  
6 Government in the order that's set forth on this chart, and  
7 then there's three each with regard to the alternates, so we  
8 need 40 jurors to pick the 18, the jury of 12 plus the six  
9 alternates, all right?

10 MR. AGNIFILO: Yes.

11 THE COURT: All right.

12 I have a letter here from one of the jurors that I  
13 want the parties to read regarding -- you'll see. Just come  
14 on up.

15 (Sealed sidebar.)

16 (Continued on next page.)

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SEALED BY ORDER OF THE COURT

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1 (Sealed sidebar conference held on the record out of  
2 the hearing of the jury.)

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

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16 [REDACTED]

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SEALED BY ORDER OF THE COURT

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SEALED BY ORDER OF THE COURT

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(Sealed sidebar end.)

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(Continued on following page.)

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1 (In open court.)

2 THE COURT: Let's get the jurors in here.

3 At this time, Mr. Reccoppa is going to bring in -- I  
4 think it's 51 jurors. We had one juror who did put in his  
5 questionnaire that he was going away tomorrow, and so without  
6 objection, we are going to strike that juror.

7 MR. AGNIFILO: Very good.

8 THE COURT: Is that agreed to? To strike the juror  
9 who is going on vacation or is coming back from vacation,  
10 whatever it was.

11 MS. PENZA: What number, Your Honor?

12 THE COURT: Sixty-two.

13 MS. PENZA: Yes, Your Honor.

14 THE COURT: Any objection from the Government?

15 MS. PENZA: No, Your Honor. We had already agreed.

16 THE COURT: Okay. Thank you.

17 Let me just tell you how we are going to operate  
18 today. We are going to put 18 of the jurors in the box and  
19 the rest will be in the couple of rows in order -- in the  
20 couple of rows, the first row, the one inside the well, and  
21 then the next row. If we need more, we'll do more. And then  
22 we'll do the strikes. When we're done with the strikes and  
23 I've sworn in the jury, the jurors will go downstairs and meet  
24 with the marshals about transportation issues and then they'll  
25 be told to come back tomorrow morning at 9:30 and that will be



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1 it for them for the day, and if we have any additional  
2 business, we'll have that business after we've sworn in the  
3 jury.

4 Does anyone anticipate needing to see me afterwards?

5 MS. PENZA: We just have a few brief housekeeping  
6 matters. We can do them now or after, whatever Your Honor  
7 prefers.

8 THE COURT: Why don't we start with them now and  
9 finish them later if we need to.

10 MS. PENZA: Thank you, Your Honor.

11 So first, Your Honor, the Government -- as you know,  
12 there's been an ongoing dispute about whether NXIVM is a  
13 continuing organization. NXIVM has obviously purported to be  
14 such, but we have had enormous difficulty getting a custodian  
15 of records and the defendant has now been unwilling to agree  
16 to any stipulations, so given the position that we're in,  
17 we're asking that the Court so order a trial subpoena for a  
18 custodian from NXIVM to authenticate records that were  
19 provided to us pursuant to subpoena. That's the first item.

20 THE COURT: Why don't you submit that.

21 MS. PENZA: Yes, Your Honor. I have it. I have it  
22 with me.

23 THE COURT: Why don't I just sign it.

24 MS. PENZA: Okay.

25 And then we understand this is without objection

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1 from the defense, but we would ask permission for Special  
2 Agent Michael Weniger to be at counsel table alternating with  
3 Special Agent Michael Lever who has been before the Court.

4 THE COURT: No objection?

5 MR. AGNIFILO: No objection.

6 THE COURT: All right, very well. So ordered.

7 MS. PENZA: We are asking that -- the one request  
8 that we didn't put into our motion that Your Honor granted  
9 regarding the victims' -- protecting the privacy interest of  
10 various victims, we are asking that for any person whose  
11 identify is being protected, that the courtroom artists not be  
12 allowed to sketch them and that their photographs, to the  
13 extent they're entered into evidence, be sealed.

14 THE COURT: Any objection?

15 MR. AGNIFILO: Just the last part.

16 THE COURT: State it again, please.

17 MS. PENZA: Yes. That anyone for whom there is an  
18 agreement that we are going to protect their identity in some  
19 way, that the courtroom -- that any courtroom sketch artist  
20 will not sketch them, and that to the extent their photographs  
21 are entered into evidence, that those photographs will be  
22 sealed.

23 MR. AGNIFILO: I have no objection to that.

24 THE COURT: All right. It's so ordered.

25 MS. PENZA: Thank you, Your Honor.

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1 THE COURT: Now, the only question is how you go  
2 about advising the sketch artists, and I don't want to do that  
3 in front of the jury, so you are going to need to give me an  
4 order --

5 MS. PENZA: Yes.

6 THE COURT: -- proposed order to that effect which  
7 will be provided to the sketch artists.

8 MS. PENZA: Yes, Your Honor.

9 And then, Your Honor, we wanted to know whether Your  
10 Honor would like hard copies of the exhibits. There's about  
11 17 very large binders so far, if Your Honor wants them,  
12 otherwise we can provide them on a thumb drive, whatever Your  
13 Honor prefers, or both.

14 THE COURT: Both.

15 MS. PENZA: Yes, Your Honor.

16 And then finally, in terms of protecting the  
17 identity, I actually have not had an opportunity to discuss  
18 this with defense counsel, but I --

19 THE COURT: Stop for a moment. You received, on  
20 Saturday, the Court's sealed order regarding the Government's  
21 motions in limine, correct?

22 MR. AGNIFILO: I did, Judge, yes.

23 THE COURT: And what I've asked is that the parties  
24 consult and send me a redacted version of that so that it can  
25 be placed on the public docket.

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1 MR. AGNIFILO: Very good.

2 THE COURT: And I gave you a deadline of next  
3 Friday.

4 Yes, Your Honor, and so we will --

5 THE COURT: This Friday -- coming Friday.

6 MS. PENZA: And we will comply with that.

7 THE COURT: Okay. Thank you.

8 Consistent with the Court's order, the Government --  
9 this is a case where obviously a lot of the witnesses know  
10 each other and there's going to be a lot of cross references  
11 of various witnesses, so we can discuss it further with  
12 defense counsel, but I don't think -- this isn't a case where  
13 I think the fact of, like -- what we are asking for, Your  
14 Honor, is potentially to have a cheat sheet in front of  
15 witnesses with the alias of various witnesses to remind them  
16 to use those aliases. I don't think this is a case where  
17 that's going to trigger any kind of memory or anything for  
18 various individuals because the names of these people are very  
19 well known to all of the witnesses and we're happy to discuss  
20 that further with defense counsel, but I do think it would be  
21 helpful and prudent to have that type of cheat sheet available  
22 for witnesses.

23 THE COURT: Why don't you try to work that out and  
24 let me know.

25 MR. AGNIFILO: Just so it's clear, I object to any

1 alteration of a witness's name, and I object to it because one  
2 of the ways that you gauge if someone is telling the truth  
3 about an event or not is if they're accurate about who was  
4 there and who wasn't there, and what I'm afraid is going to  
5 happen is that someone is going to read the cheat sheet wrong,  
6 give an answer, and we're not going to know if this person is  
7 lying about this past event, telling the truth about this past  
8 event, or is reading the cheat sheet wrong, and then we get  
9 into this whole bit with -- I think first names are easy. You  
10 know, we just do first names, that's easy. There are a couple  
11 of people that have the same name -- same first name, we'll  
12 figure out a way of dealing with that, but if we're going to  
13 start using anything other than first names, this is going to  
14 be -- it's unworkable. It's unworkable given the number of  
15 people and given the need in testing someone's credibility to  
16 have them testify accurately about who was at certain events.

17 MS. PENZA: Your Honor, I want to be very clear --  
18 first of all, Your Honor has already ruled regarding the  
19 defendant's first point about the anonymity, so -- or not --  
20 rather, the protecting of the identity, but the Government is  
21 working very hard in terms of using only first names -- we  
22 think that's obviously the most convenient for everybody --  
23 and we are not looking to make things more difficult. There  
24 are a couple witnesses where we are expecting to request a  
25 slight alteration to their name or use of their first initial

## Proceedings

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1 because their name is distinguishing in some specific way or  
2 because they are victims of very specific crimes. We don't  
3 believe that's going to be a problem, but just a reminder not  
4 to use certain people's last names is basic -- because  
5 naturally, a lot of these witnesses, because they are  
6 distinguishing between people who have the same first name,  
7 et cetera, naturally say the last names when they're talking  
8 about people, and they were in this kind of formal environment  
9 sometimes where they did use last names, so it's just a matter  
10 of making sure that instinctively these witnesses don't say  
11 the last name. The Government is working very hard with  
12 witnesses to ensure that that doesn't happen but it doesn't  
13 seem to cause any additional prejudice.

14 THE COURT: Well, where you have first names that  
15 are similar to one another or identical, you can always use  
16 the first initial of a last name, and it seems to me that that  
17 may solve the problem, but why don't you discuss this with the  
18 defense to see if your area of disagreement, if there is one,  
19 can be narrowed and then I'll deal with it.

20 MS. PENZA: Okay. Thank you, Your Honor.

21 MR. AGNIFILO: I'm happy to discuss, but I want the  
22 record to be clear we have an objection to any alteration of  
23 names.

24 THE COURT: I didn't even say an alteration.

25 MR. AGNIFILO: No, no, no. Just --

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1 THE COURT: I said using the first letter of the  
2 last name might be a way of dealing with it and if the  
3 Government wants permission to advise a witness not to use a  
4 certain individual's last name because the Court has ordered  
5 that last names not be used, then that could be a solution,  
6 too, potentially. I'm not sure if that would be  
7 objectionable.

8 MR. AGNIFILO: I'm happy to work with the  
9 Government.

10 THE COURT: I'm not reaching any conclusions. I'm  
11 just asking you to find a way out of the problem, that's all.

12 MR. AGNIFILO: Understood.

13 If Ms. Penza is done, I have a couple of things.

14 THE COURT: Anything else?

15 MS. PENZA: I'm finish for now, Your Honor.

16 THE COURT: Thank you.

17 Yes, sir.

18 MR. AGNIFILO: I would like a clarification, if I  
19 could, on the Court's Rule 16 defense discovery provision  
20 because I think it's -- what I see happening, I see -- from  
21 our perspective, many of the witnesses are not going to be  
22 entirely truthful about their contact with Mr. Raniere for  
23 whatever reason. I believe one of the ways that I'm going to  
24 show that these witnesses are not entirely truthful is by  
25 things that they have said in the past or things that they

1 have written in the past. Now, it's heartland  
2 cross-examination, of course, if a witness testifies and I  
3 think that their witness said something in the past that's  
4 inconsistent with the witness's testimony on direct  
5 examination, that's heartland cross-examination. My concern  
6 is in impeaching the credibility of the witness I am also  
7 furthering aspects of my core theory, which is that  
8 Mr. Ranieri never had unwanted sexual contact with anybody at  
9 any time. I mean, that's going to be a core theory. I'm  
10 going to open on that.

11 And the two -- I'm worried about Your Honor's  
12 ruling. Obviously, I want to abide by the Court's ruling, but  
13 I'm afraid that there are due process implications to what is  
14 happening to my ability to cross-examine a witness who may not  
15 be telling the truth if I have to give the Government what  
16 they said in writing so that the Government can prep the  
17 witness to be more accurate on direct examination. That's  
18 just not the process.

19 THE COURT: I understand your point. We will take  
20 it up afterwards.

21 Are we ready?

22 THE COURTROOM DEPUTY: We're ready.

23 THE COURT: All right. Let's bring in the jurors.  
24 (Prospective jurors enter.)

25 THE COURTROOM DEPUTY: Can I have Juror 11, please;



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1 Juror 12; Juror 20. Where is Juror 20? Twenty-three, 26, 31,  
2 32, 36, 42, 44, 48, 50, 52, 57, 60, 63, 64, 65, 71, 73, 77,  
3 78, 80, 90, 95, 100, 112, 116. Okay. That's it.

4 THE COURT: All right. Please be seated.

5 Good morning, ladies and gentlemen. I am's Judge  
6 Garaufis, and today we are going to make the final decision as  
7 to who will be the members of the jury, and we will start with  
8 a sidebar of the parties and they will indicate the jurors who  
9 they will strike without cause from the jury. So when we're  
10 all done at the end of the jury selection, the jury will be  
11 sworn in. Anyone who is not selected for the jury will go  
12 back to the jury assembly area for further instructions, and  
13 those who are selected for the jury will then meet with the  
14 marshals about transportation to and from the courthouse and  
15 have lunch in the jury lunchroom.

16 So at this time, we're going to start with the round  
17 one.

18 Anything before we start?

19 MR. AGNIFILO: Nothing from us.

20 THE COURT: Okay. Let's start with round one at  
21 sidebar.

22 (Sidebar.)

23 (Continued on next page.)

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Sidebar

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1 (Sidebar conference held on the record out of the  
2 hearing of the jury.)

3 THE COURT: All right. Do you object to your client  
4 not being present, or does your client want to be present?

5 MR. AGNIFILO: Let me ask. Let me ask.

6 THE COURT: Yes, why don't you ask him.

7 MS. SAUL: Your Honor, is my presence all right?

8 THE COURT: You're fine.

9 All right, just move a little closer.

10 In round one, the Government has one challenge and  
11 goes first and the defense has two challenges, so why don't we  
12 start with the Government.

13 MS. PENZA: The Government strikes Juror No. 23.

14 THE COURT: And the defense?

15 MR. AGNIFILO: We're going to strike Juror 48.

16 THE COURT: Forty-eight and --

17 MR. AGNIFILO: -- 73.

18 THE COURT: Seventy-three.

19 Can we go on to round two at this point?

20 MS. PENZA: Yes.

21 THE COURT: Is that all right?

22 MR. AGNIFILO: That's fine, Judge.

23 THE COURT: In the second round, the defense goes  
24 first and has two strikes.

25 MR. AGNIFILO: We strike 63.

Sidebar

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1 THE COURT: Yes?

2 MR. AGNIFILO: And we strike 64.

3 THE COURT: And then the Government goes -- 63 and  
4 64 are struck by the defense, and then the Government in round  
5 two has one strike.

6 MS. PENZA: The Government strikes No. 42.

7 THE COURT: All right. Can we go on from there?

8 MR. AGNIFILO: We can go.

9 THE COURT: Okay. In the third round, the  
10 Government goes first and has one strike.

11 MS. PENZA: The Government strikes 32.

12 THE COURT: Thirty-two struck by the Government.  
13 And the defense goes second and has two strikes.

14 MR. AGNIFILO: Yes, thank you, Judge. Just to be  
15 clear, we are going through 116?

16 MS. PENZA: Yes, Your Honor.

17 THE COURT: Okay --

18 MS. PENZA: No. We have 117.

19 THE COURT: What's the last one in this group?

20 THE COURTROOM DEPUTY: I have it as 116.

21 MR. AGNIFILO: Thank you, Judge.

22 We are going to strike 112.

23 THE COURT: All right.

24 MR. AGNIFILO: And we're going to strike 95.

25 THE COURT: Okay. Can we go on to round four?

Sidebar

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1 MR. AGNIFILO: Yes, Judge.

2 THE COURT: Round four? In round four, the defense  
3 goes first and has two strikes.

4 MR. AGNIFILO: We are going to strike 60.

5 Just bear with me one second, Judge.

6 THE COURT: Sure.

7 (Pause.)

8 MR. AGNIFILO: And we're going to strike 90.

9 THE COURT: And the Government goes second and has  
10 one strike.

11 MS. PENZA: We strike No. 80.

12 THE COURT: Eighty?

13 MS. PENZA: Yes.

14 THE COURT: Okay. Can we keep going?

15 MR. AGNIFILO: Here's my question, what I would like  
16 to do ultimately is dismiss the jurors that have been struck  
17 so that I can see who is left.

18 THE COURT: Why don't I do this, why I don't ask the  
19 jurors who you have struck to stand and then you can look at  
20 them because --

21 MR. AGNIFILO: That we struck.

22 THE COURT: I have a reason that I want to do it  
23 this way, frankly.

24 MR. AGNIFILO: That's fine.

25 THE COURT: That's the reason we are going to use,

Sidebar

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1 but here's the point. The point is that we will come back and  
2 then at that point, if everyone has agreed that they should be  
3 sent back to the jury assembly area, that would be fine, but  
4 first I would like to have them stand so I can see who they  
5 are.

6 MR. AGNIFILO: That's fine.

7 THE COURT: So why doesn't everyone go back to their  
8 places and then I'll just have them stand and then have you  
9 come back.

10 MR. AGNIFILO: Very good.

11 THE COURT: Thank you.

12 (Sidebar end.)

13 (Continued on following page.)

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Proceedings

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1 (In open court.)

2 THE COURT: At this point, I'm just going to ask  
3 certain jurors to rise in place and -- for the benefit of the  
4 parties and the Court. The following jurors: Juror 23 --  
5 just stand in place -- Juror No. 42, Juror No. 32, and  
6 Juror No. 80. Okay. You may be seated.

7 All right. I also want the following jurors now to  
8 stand in place: Juror No. 48; No. 73; No. 63. Sixty-three.  
9 Thank you. Sixty-four, 112, 95, 60, and 90. All right. You  
10 may be seated.

11 All right. Let's have a sidebar again.

12 (Sidebar.)

13 (Continued on next page.)

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Sidebar

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1 (Sidebar conference held on the record out of the  
2 hearing of the jury.)

3 THE COURT: Let's get the rest of the Government in  
4 here.

5 So at this point, does everyone agree that I should  
6 allow the jurors who I just identified to take their things  
7 and wait in the jury assembly area; is that agreeable?

8 MR. AGNIFILO: Yes.

9 MS. PENZA: Yes, Your Honor.

10 THE COURT: Do you still want to follow up with the  
11 procedure that you suggested that you want to see who is left?

12 MR. AGNIFILO: That's right.

13 THE COURT: Any objection?

14 MS. PENZA: No.

15 THE COURT: Okay. All right. I will excuse those  
16 who have already been struck, but I will leave them downstairs  
17 so in case something comes up, we can always bring them back.

18 MR. AGNIFILO: Okay.

19 Then can we go back -- once you excuse the jurors  
20 who have been struck, can we go back and have a chance to talk  
21 at our tables?

22 THE COURT: Yes, of course. I will send you back to  
23 the table and let me know when you are ready to go to the next  
24 step.

25 MR. AGNIFILO: Thank you, Judge.

Sidebar

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THE COURT: Thank you.

(Sidebar end.)

(Continued on following page.)



Proceedings

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1 (In open court.)

2 THE COURT: All right. At this time, the following  
3 jurors, please take your things and return to the jury  
4 assembly area and wait for further instructions from the  
5 Court, all right? The following jurors just stand and when  
6 all of you have been named, you can then all leave at the same  
7 time.

8 Juror No. 23, Juror No. 48, Juror No. 73, Juror  
9 No. 42, Juror No. 63, Juror No. 64, Juror No. 32, Juror  
10 No. 112, Juror No. 95, Juror No. 80, Juror No. 60, and  
11 Juror No. 90.

12 All right, please take your things, return to the  
13 second floor to the jury assembly area and wait there for  
14 further instructions. Thank you very much.

15 (Pause.)

16 MR. AGNIFILO: We are ready whenever you are, Judge.

17 THE COURT: All right. Let's resume.

18 (Sidebar.)

19 (Continued on next page.)  
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Sidebar

624

1 (Sidebar conference held on the record out of the  
2 hearing of the jury.)

3 THE COURT: Okay. In the fifth round, the  
4 Government goes first. Who do you want to strike?

5 MS. PENZA: No. 116.

6 THE COURT: 116.

7 And the defense has one strike in the fifth round.  
8 Hold on just one minute.

9 MR. AGNIFILO: We strike 44.

10 THE COURT: Can we go to the sixth round?

11 MR. AGNIFILO: Yes.

12 THE COURT: Okay. In the sixth round, the defendant  
13 goes first and has one strike.

14 MR. AGNIFILO: Okay. We strike 100.

15 THE COURT: You want 100 to stand?

16 MS. PENZA: No, no. I just wanted to see. I  
17 appreciate it.

18 THE COURT: Okay.

19 The Government has one in the sixth round.

20 MS. PENZA: We pass.

21 THE COURT: Pass.

22 MR. AGNIFILO: They passed.

23 THE COURT: Passed.

24 MR. AGNIFILO: Yes.

25 THE COURT: Okay. Hold on now.

Sidebar

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1           So the jurors are as follows, we'll go over the  
2 list: 11, 12, 20, 26, 31.

3           MR. AGNIFILO: All right, I might have screwed up my  
4 records. Go ahead, 31, I apologize.

5           THE COURT: Thirty-six, 50, 52, 57, 65, 71, 77,  
6 78 -- 78? Not 78. Seventy-eight will be the thirteenth  
7 juror.

8           MR. LESKO: Yes.

9           THE COURT: So up to 77. Let's make sure we have 12  
10 because they passed on one.

11          MR. LESKO: Yes.

12          MR. AGNIFILO: Right.

13          THE COURT: Does everyone agree that's 12 jurors?

14          Now, the question is, what do we do with Juror 78  
15 who was passed on, who is among the 28 jurors who we were  
16 considering but is still here?

17          MS. PENZA: The Government's position is they should  
18 still be in the alternate pool.

19          MR. AGNIFILO: That's fine with us.

20          THE COURT: All right, that's fine.

21          At this point, I'm going to dismiss 116, 44, and 100  
22 to go back downstairs.

23          Does everyone agree to the 12 jurors? Is there any  
24 objection?

25          MR. AGNIFILO: Can you read it one more time?

Sidebar

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1 THE COURT: What's that?

2 MR. AGNIFILO: Can you read the 12 again?

3 THE COURT: I would be happy to: 11, 12, 20, 26,  
4 31, 36, 50, 52, 57, 65, 71, and 77.

5 MR. AGNIFILO: Very good.

6 THE COURT: All right?

7 MR. AGNIFILO: Yes.

8 THE COURT: Anyone have a motion, objection --

9 MS. PENZA: No, Your Honor.

10 THE COURT: -- to the jury?

11 MR. AGNIFILO: No.

12 THE COURT: Then we'll go on and we'll seat the next  
13 12 to be alternates, and each side will get three challenges;  
14 and as you can see, on the alternates, the Government goes  
15 first and the defense goes second.

16 MR. AGNIFILO: Very good.

17 THE COURT: All right. Thank you.

18 (Sidebar end.)

19 (Continued on following page.)  
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1 (In open court.)

2 THE COURT: All right, will the following jurors  
3 please stand: Juror No. 116 and 44 and No. 100. All right,  
4 what I would like you to do is to take your things, go back to  
5 the jury assembly room and remain there until the Court  
6 provides further instructions.

7 (Prospective jurors exit.)

8 THE COURTROOM DEPUTY: 117, please, 120, 122, 124,  
9 125, 126, 138, 140, 142, 143, 144, and 153.

10 THE COURT: That's it.

11 (Continued on the following page.)  
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1 (In open court.)

2 THE COURT: Okay.

3 (Sidebar conference.)

4 (Continued on the next page.)

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Sidebar

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1 THE COURT: All right. Now each side will get three  
2 challenges. We'll start with the government, all three  
3 please.

4 MS. PENZA: Yes, Your Honor, 117, 122 and 143. And  
5 143.

6 THE COURT: All right. Hold on.  
7 117, 122, and 143.

8 And the defense three gets the final three  
9 challenges.

10 MR. AGNIFILO: All right, 124, 142, 138.

11 THE COURT: 124, 142 and 138. All right.  
12 So the alternates will be 78, 120, 126, 140, 144,  
13 and 153. Does everyone agree?

14 MR. AGNIFILO: Yes, Judge.

15 MS. PENZA: Yes, Your Honor.

16 THE COURT: All right. Are there any objections or  
17 motions?

18 MR. AGNIFILO: Nothing from the defense.

19 MS. PENZA: Not from the government.

20 THE COURT: All right. So just to go over it one  
21 more time. The 12 jurors are: Numbers 11, 12, 20, 26, 31,  
22 50, 52, 57 --

23 MS. PENZA: Thirty-six, Your Honor.

24 THE COURT: I missed 36, right. Let's go back from  
25 36. 36, 50, 52, 57, 65, 71, and 77. And the alternates are

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1 78, 120, 126, 140, 144 and 153.

2 MR. AGNIFILO: Agree.

3 THE COURT: That's our jury. The next step will be  
4 we'll seat them, we'll swear them in. I'll have the remaining  
5 jurors who were not among the 40 return to the jury assembly  
6 area along with the six who we have just struck and that will  
7 be the jury, then they'll be sworn in and we'll take a break,  
8 all right, then resume to hear from you at about 11:30.

9 MR. AGNIFILO: Very good. Thank you, Judge.

10 THE COURT: Thank you.

11 (End of sidebar conference.)

12 (Continued on the next page.)

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1 (In open court.)

2 THE COURT: All right. The following jurors please  
3 rise: Juror 117, Juror 122, Juror 143, 143, yes. Juror 124,  
4 Juror 142, and Juror 138. Please take your things, go back to  
5 the jury assembly area and I will provide further instructions  
6 in a few minutes. You may go.

7 (Prospective jurors excused.)

8 THE COURT: Let's seat the jurors.

9 THE COURTROOM DEPUTY: 153 take a seat in the third  
10 row. 144 take that seat. 140, 120, 126. 120, and 78.

11 THE COURT: At this point -- thank you. All the  
12 other jurors who have not been called just stand up, everyone  
13 else who is here for jury selection. What I'd like you to do  
14 is take your things, return to the jury assembly area and  
15 await further instructions from the Court. Thank you very  
16 much.

17 (Prospective jurors excused.)

18 THE COURT: All right. Ladies and gentlemen, you  
19 will constitute the jury and the alternate jurors for this  
20 case. And the clerk will swear you in. Please rise.

21 (Jury sworn.)

22 THE JURY: I do.

23 THE COURT: Please be seated. Let me just give you  
24 some preliminary information. First of all, each of you will  
25 receive a copy of the schedule for the trial. So you'll have

1 your own copy. Each day of the trial will be identified on  
2 basically a calendar so you will know when you need to be here  
3 and when you don't need to be here. When we adjourn for  
4 today, which will be in a few minutes, as I said earlier you  
5 will go, Mr. Reccoppa will show you the jury deliberation  
6 room, but then you will go downstairs to the juror's lunch  
7 room where you'll be having your lunches. It's a little  
8 bigger room, it has bigger windows and you'll be having your  
9 lunches there, they'll be a buffet luncheon for you today.  
10 You will be interviewed by the marshals as to where you will  
11 be, how you'll be transported to and from the courthouse every  
12 day during the trial and so just bear that in mind. And when  
13 that's done, the marshals will then transport you for today  
14 and you'll be picked up tomorrow following their protocol,  
15 which I'm not terribly familiar with, but they will tell you.

16 And I'm going to remind you that -- oh, in addition,  
17 you'll be able to take notes. So there are legal pads and  
18 pens in the jury room. You'll be able to take your own notes  
19 if you wish to, you don't have to, but the notes need to be  
20 left in the jury room at the end of the day.

21 You'll remember I told you about not discussing the  
22 case with anyone. Don't discuss the case with anyone, don't  
23 do any research on the case, you're not to discuss or think  
24 about this case with any other person or online and so forth.  
25 I'm not going to do the whole -- give you all the

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1 instructions, I've given them to you several times now, so but  
2 I will start using them again tomorrow.

3 We'll start at 9:30 in the morning and we'll end no  
4 later than 5 p.m. each day of trial. If the schedule is going  
5 to change, I will tell you in advance that the schedule is  
6 going to change, where we have to end early or start late and  
7 we try to avoid that because we want to complete the work of  
8 the jury as expeditiously as possible.

9 So on behalf of the parties and the Court, I thank  
10 you for your attention and we'll continue to thank you for  
11 your attention for the trial.

12 All rise for the jury.

13 (Jury exits courtroom.)

14 THE COURT: All right. We will resume at 11:30 and  
15 continue the discussion. What I will do now is go down to the  
16 jury assembly area and thank the jurors who came in, both the  
17 group that was in the courtroom and also another group of  
18 jurors that we had just in case we didn't have enough jurors  
19 to reach the number 40.

20 Is there anything before we take a recess?

21 MS. PENZA: No, Your Honor.

22 THE COURT: Anything.

23 MR. AGNIFILO: Nothing, Judge.

24 THE COURT: Why don't you look at that letter as  
25 well.

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1 MR. AGNIFILO: I will. Thank you.

2 THE COURT: Thank you, everybody.

3 (Recess.)

4 THE COURT: All right. Please sit down. Everyone  
5 is here.

6 Did you have a chance to read --

7 MR. AGNIFILO: I have read it, Judge.

8 THE COURT: Do you want to comment on it or send  
9 me -- it might be useful, since it's filed under seal, to send  
10 me a short letter.

11 MR. AGNIFILO: That's what we'll do, send you a  
12 short letter as close -- as soon as possible. I imagine we  
13 could probably do it by six or 7 o'clock.

14 THE COURT: That's fine.

15 MR. AGNIFILO: Thank you, Judge, you'll have it.

16 THE COURT: All right. Then on the Rule 16 issues,  
17 did you want to address it.

18 MR. AGNIFILO: Thank you. My concern -- I raised  
19 the objections to the general principle in my written  
20 materials and I'm not going to go over that again, but my  
21 concern is this. Is there seems to be a line that is drawn  
22 that -- it's an imaginary line between what is impeachment  
23 because you're undermining the credibility of a witness and  
24 what is furthering your case in chief. So I think the most  
25 useful thing -- because Your Honor has tried a million

1 cases -- is give you an example.

2 If the government put up a witness to talk about  
3 DOS-related things but I wanted to say -- use the witness to  
4 talk about one of Keith Raniere's patents, that would clearly  
5 be beyond the scope of direct examination and that would make  
6 sense that for me to be able to do that, that is a case in  
7 chief type thing.

8 THE COURT: For you to go into a new area.

9 MR. AGNIFILO: A new area, correct.

10 THE COURT: But what.

11 MR. AGNIFILO: So my point, though, is, I'm not  
12 going to be going into a new area with any of these witnesses,  
13 but what I am going to be doing, I expect, is I'm going to  
14 be -- this witness is going to say something on direct  
15 examination, I don't know exactly what it is, because I've  
16 never spoken to these people and they're not my witness, so  
17 they are going to say something on direct examination. It's  
18 my contention some of these witnesses are going say things on  
19 direct examination that are not truthful and they are going to  
20 say things on direct examination that are not truthful either  
21 because of their own maybe current situation or maybe their  
22 situation at the time, they don't want to admit to the world  
23 that they had a consensual relationship with Keith Raniere, so  
24 they are not going to be truthful. The way I'm going to show  
25 this jury that they are not going to be truthful, in part, is

1 I'm going to show some of these witnesses other things that  
2 they have said closer to the time that these events were  
3 taking place.

4 Now, I do not want to have to give the government  
5 that before the witness testifies on direct examination  
6 because what will happen is they, being very good, experienced  
7 trial lawyers, will sit down with the witness and they will  
8 prepare the witness and the witness' testimony in front of  
9 this jury will change, and it will change forever. I won't be  
10 able to show that the witness wasn't being truthful, I won't  
11 be able to show certain specific areas where the witness lied,  
12 exaggerated, or misremembered certain things, all the things  
13 that a lawyer does on cross-examination to try to show a jury  
14 that a witness isn't being entirely truthful. I won't be able  
15 to do all those things because I've given the government, I've  
16 given the government material to help the government to  
17 prepare the witness for the witness' direct examination.

18 So the dilemma I have, and it's -- I'm not kept up  
19 all night by a lot of things but I've been kept up all night  
20 by this, is I do not want to run afoul of Your Honor's ruling.  
21 I don't want to run afoul of Your Honor's ruling for many  
22 reasons, one is because it's Your Honor's ruling and, two,  
23 running afoul of Your Honor's ruling could be that I am  
24 precluded from certain lines of cross-examination or certain  
25 things I could do on cross-examination and I can't let that

1 happen because in this case cross-examination is really -- in  
2 every case but in this case I think it's very, very important.

3 So I guess I'm looking for guidance from a trial  
4 judge that's had a lot of trials and knows how  
5 cross-examination works and has seen many things of what I  
6 should do. And there are two -- there's three possibilities.  
7 I could give the government the stuff that I have that I don't  
8 think they have. Now part of the reason I think they don't  
9 have it, quite honestly I'm dying to ask the witness this, is  
10 I think the witness said, I don't have that. Do you have  
11 certain things, I don't want to get into them because that's  
12 the whole point of the cross-examination, whatever they may  
13 be, communications with Keith Raniere. No, I don't have  
14 anything like that. You know what? They do. And I have  
15 them. Now I don't think they were honest with the government  
16 and I think they weren't honest with the government because  
17 they know that these things are going to show a very different  
18 story than they're prepared to get on that witness stand and  
19 say. And this should be done in Court. This is exactly what  
20 cross-examination is for. And I shouldn't have to give the  
21 government my stuff so that the witness can appear truthful  
22 solely because I gave the government something to prepare the  
23 witness before the witness testifies on direct.

24 Now, there's a middle ground and the middle ground  
25 is this: I can give the government the materials after the

1 witness's direct. And if they want half an hour, 45 minutes  
2 to review it, then they can't affect the witness's direct  
3 testimony because the witness has already testified on direct.  
4 Your Honor will get it, the government will get it and that  
5 seems to be a workable solution. Because at the end of the  
6 day, none of this is really my case in chief and it can't be  
7 my case in chief because I have no control over this witness  
8 at all. I don't know what witnesses they're going to call. I  
9 only know 48 hours in advance. These are people I haven't  
10 spoken to, so to say that a witness I have no control over,  
11 that I never spoken to and that I don't know what the witness  
12 is going to say on the stand is somehow my case in chief --  
13 and I've read all the same cases Your Honor has and I'll say  
14 this just because one day maybe I'll happy that I said it, I  
15 think this line of cases is wrong. This has not been passed  
16 upon by the Second Circuit, not been passed upon by any  
17 circuit and I think the current way that a defense case in  
18 chief has been defined by these trial court cases is, most  
19 respectful, an error.

20 Rule 16 is a pretrial discovery rule. We're not  
21 pretrial. For Rule 16 discovery obligations, in my opinion,  
22 cannot be created during a trial because I have no control  
23 over it. Rule 16 is for when I know what my case is going to  
24 consist of, I know certain witnesses are going to testify  
25 because they're my witnesses, they are people that I spoke to,



1 they're people I'm going to put on as part of my case and I  
2 know what they're going to say and I have a discovery  
3 obligation because I have control over the witness and I know  
4 what they're going to say. For me to have a Rule 16  
5 obligation imposed on me in a 48-hour period because the  
6 government tells me who their witnesses are, then I have to go  
7 back and figure out if this is really impeachment or if this  
8 something else, is not what Rule 16 is meant to do. Rule 16  
9 puts an obligation on me to tell the government if I am  
10 putting a case on in chief of witnesses that I have some  
11 control over.

12 Now, the only way that that's not true is that  
13 example that I started with. There are times when, even  
14 though it's technically on cross, a lawyer gets into a new  
15 area and it's not really cross. And maybe the Court will  
16 allow it just so we don't have to call the witness back on  
17 direct on the defense case, and I agree with the Court. And I  
18 think that these decisions are struggling to sort of find that  
19 balance, but what I don't want to do and what I don't think I  
20 have to do and what I, most respectfully, object to doing is  
21 giving the government written materials that they don't have  
22 or they may not have or they certainly didn't produce in  
23 discovery of witnesses that they are going to be calling,  
24 because I believe these materials are important to impeach  
25 their witness.

1           Now the way that this area gets sort of fuzzy is  
2 because impeaching their witness is somewhat kind of  
3 co-terminus with my case in chief. If my case in chief is  
4 Keith Raniere did -- this was a consensual sexual encounter,  
5 that's part of my case in chief obviously, that's going to be  
6 a central part of my case in chief, but it also undermines the  
7 witness's credible because she just said something very  
8 different on direct examination.

9           So I do not want -- I read Your Honor's decision all  
10 day Saturday and I've been thinking about it a lot and I want  
11 to not run afoul of it, but I also see due process  
12 implications from us having to turn over materials of the  
13 nature that I've sort of set out.

14           THE COURT: All right, thank you.

15           MS. PENZA: Yes, Your Honor. Your Honor, you have  
16 already ruled on this issue and the defendant has not raised  
17 any basis to reconsider this and the defendant conceded --

18           THE COURT: Well, the defendant is, if I may, the  
19 defense is saying, well, the Second Circuit really hasn't  
20 delineated the different categories of the evidence, that  
21 which is impeachment as opposed to that which is the defense's  
22 case in chief for purposes of discovery, so that's what --  
23 they're saying lower courts, I basically relied on the lower  
24 courts in this circuit and I think that's a fair statement,  
25 don't you?

1 MS. PENZA: I do, Your Honor, and I agree that Your  
2 Honor properly held as to the reasoning of those lower courts  
3 and so, Your Honor, when you -- first of all, the defendant  
4 produced not a single piece of Rule 16 discovery so to now say  
5 that this is supposed to be a pretrial idea, it wasn't until  
6 the past couple of weeks that the defendant has said he  
7 doesn't intend to put on his own case in chief. Up until a  
8 week ago -- a couple of weeks ago we were hearing from  
9 Mr. Agnifilo that he was going to call all sorts of witnesses  
10 and yet the government saw not a single piece of discovery.  
11 So the idea that he did not follow Rule 16 properly before and  
12 now should be able to hold back materials doesn't hold any  
13 water.

14 But I think the most important thing, Your Honor, is  
15 that what Mr. Agnifilo has been describing does not sound like  
16 proper impeachment. If he elicits things from a witness and  
17 then it turns out that he can ask the witness a question and  
18 then he gets to a place where he believes he has something  
19 contrary to what that witness says, he can impeach that  
20 witness. But that's not what we're talking about here, Your  
21 Honor. We're talking about the defendant trying to admit  
22 evidence through a witness who is going to be testifying for  
23 the government. And so this is not supposed to be trial by  
24 ambush. The government hasn't operated by trial by ambush  
25 and, in fact, Your Honor, given your ruling on Saturday the

1 defendants asked for us to produce the exhibits we intended to  
2 use with the witnesses we were calling. That was never  
3 ordered by Your Honor and yet the government has made active  
4 attempts to provide that in order to streamline objections and  
5 to make sure that we are operating properly with the  
6 understanding, which was repeated multiple times by the  
7 defendant, that they were going to be providing for us,  
8 according to Your Honor's order, the items that they intended  
9 to put into evidence through cross-examination of our  
10 witnesses.

11 And so for those reasons I don't believe that  
12 Mr. Agnifilo is being -- his complaints don't carry water  
13 because this is -- what he is trying to do is actually build  
14 his case through the witnesses not impeach them.

15 Additionally, to the extent what Mr. Agnifilo is  
16 saying is that the government doesn't have certain materials.  
17 The government has a real concern that there were bad acts of  
18 the defendant that have led to him having materials that the  
19 government does not have. He has collateralized the DOS  
20 slaves who were deleting evidence for him --

21 THE COURT: Slowly. I have to absorb what you're  
22 saying, so you have to move more slowly.

23 MS. PENZA: I apologize, Your Honor. So the  
24 defendant had collateralized DOS slaves while he was in Mexico  
25 gathering evidence for him, asking people who will now be

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1 witnesses for us to delete that evidence from their own  
2 computers and devices so that he could -- so that it could be  
3 gathered by them --

4 THE COURT: Are you going to put that before the  
5 jury?

6 MS. PENZA: The idea that that happened, absolutely,  
7 Your Honor, but that shouldn't allow him to then ambush a  
8 witness with the materials that he has in bad faith gathered.

9 I do just want to make one more point, Your Honor.  
10 To the extent Mr. Agnifilo has collateral belonging to any of  
11 the victims or witnesses who are going to testify, the  
12 government's position is that those are materials that are the  
13 product of wire fraud and extortion. Defendants have already  
14 pleaded guilty to those crimes and so if Mr. Agnifilo is  
15 holding those, we would ask that the Court order that those be  
16 produced to the government immediately.

17 (Continued on the next page.)  
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1 (In open court; 11:52 a.m.)

2 MR. AGNIFILO: So what I am happy to do, and I think  
3 a compromise position is, is after the witness testifies on  
4 direct, I will give the Government and your Honor the  
5 materials that I have. None of this is illegally gained.  
6 None of this is anything --

7 THE COURT: How do I know that? How do we know  
8 that? The Government has just said that your client was in  
9 Mexico collecting collateralized material so that he could  
10 blackmail his alleged victims when they get on the witness  
11 stand or to keep them from going on the witness stand.

12 MR. AGNIFILO: That's false.

13 THE COURT: At least what I heard.

14 MR. AGNIFILO: That's a false statement. And in six  
15 weeks when this trial is over, your Honor -- I cannot wait to  
16 actually get to hear the evidence. I've been waiting to get  
17 to the evidence. There's not going to be any of that in the  
18 evidence.

19 Here is what I am happy to do, Judge. I will give  
20 your Honor -- we only know who the first two witnesses are  
21 going to be, we don't know who is after that. I will give  
22 your Honor the universe of evidence that I think falls into  
23 the category of what we're talking about for the first two  
24 witnesses when I give your Honor the sealed letter at 6:00 or  
25 7:00 o'clock this afternoon.

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1           Your Honor can see what it is, and if your Honor has  
2 concerns I'll address the concerns. I don't think at the end  
3 of it your Honor will have these concerns when you see what it  
4 is. And when I see what it is, it will be much more clearer  
5 what I'm talking about. And what I'm willing to do, even  
6 though I don't think there is an obligation on me to do this,  
7 just to make thing easier for the Court and because I want to  
8 abide -- the Government's concern about the privacy of the  
9 witnesses, I share a hundred percent. I also am mindful,  
10 though, of the due process implications for some this, but  
11 I'll raise that as I need to as the trial goes on.

12           I am very happy to give your Honor anything that I  
13 think I might use on cross-examination after the witness  
14 testifies on direct and I'll give it to the Government. And I  
15 don't know how many cases your Honor has tried. If your Honor  
16 can point to another case where this was done maybe it's done  
17 more than I think but I'm happy to do that because it will  
18 make things easier, not because I have an obligation to do it,  
19 I think it will make things easier and I want to hear from the  
20 Government if they have concerns about any privacy aspects of  
21 this because I will be mindful of them. I'm going to be very  
22 mindful during this trial of being utterly appropriate with  
23 every witness who testifies, but I do believe some of these  
24 witnesses will not be entirely truthful. And so, I have to  
25 walk the line of being appropriate, being appropriately, I

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1 don't know, gentle, but also being direct enough to bring out  
2 what I think are going to be significant inconsistencies in  
3 their stories.

4 So my proposal is twofold. One, I'll give your  
5 Honor tonight the material that's in the realm of what we're  
6 talking about for the first two witnesses that I have notice  
7 of; I agreed to give the Government the same materials at the  
8 end of the witness's direct, and we can get through the trial  
9 that way and I think that's a fair way to do it.

10 THE COURT: Anything else?

11 MS. PENZA: We have no problem, your Honor, with him  
12 providing them to the Court, for you to make a ruling  
13 regarding going forward. However, Mr. Agnifilo did not  
14 respond to the Government's concerns regarding his possession  
15 of collateral.

16 THE COURT: He says he doesn't have any.

17 MS. PENZA: I don't believe he said that.

18 MR. AGNIFILO: I don't know of any of Mr. Ranieri  
19 having any collateral.

20 MS. PENZA: Okay.

21 MR. AGNIFILO: And --

22 MS. PENZA: Or access to it.

23 MR. AGNIFILO: I don't have access to collateral.

24 THE COURT: Well, having access to it is equivalent  
25 to having it in my opinion.



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1 MS. PENZA: I agree, your Honor.

2 THE COURT: All right. So the fact that it's  
3 sitting in somebody's kitchen somewhere doesn't mean that  
4 Mr. Ranieri doesn't have access to it. And if the client has  
5 access to it, the attorney has access to it. So I don't want  
6 to hear about that.

7 Got it?

8 Got it?

9 MR. AGNIFILO: Yes, I got it. I'm a lawyer, that's  
10 all I'm doing in this case, Judge. I don't have anything to  
11 do with collateral.

12 THE COURT: I'm completely in the dark. But you  
13 should, once you know who the witnesses are going forward, two  
14 days, you can, at that time, 48 hours in advance, provide  
15 the -- what may -- the questionable cross-examination  
16 materials to the Court ex parte and we'll take a look at them.

17 How much material is this for your average witness?  
18 Are we talking about a few items, a few love letters, or a few  
19 admissions on the part of a witness that they might -- that  
20 they might be cross-examined on, or are we talking about a  
21 trove of materials and where you're asking the Court to take,  
22 to be -- to place the Court in place of your obligation to  
23 provide your evidence-in-chief to the Government. I don't  
24 want to take on that responsibility. If there are items of  
25 evidence that are questionable as to whether they're

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1 impeachment or they're evidence that would be appropriate on  
2 your case-in-chief, then you need to make the initial cut on  
3 that and not rely on me to be a member of your team. I'm not  
4 going to be a member of your team. If that's what this is  
5 about, I'm not doing it. If you're suggestion is that there's  
6 something that you're not sure about, you'll provide it to me  
7 48 hours in advance and then we'll go from there. If that  
8 doesn't work, we'll change the rules as we go along.

9 MR. AGNIFILO: That's fine. I'm not asking your  
10 Honor to be a member of our team.

11 THE COURT: You understand my perspective on this?

12 MR. AGNIFILO: I do.

13 THE COURT: You're shifting the burden from the rule  
14 to the Court and I'm not interested in doing that.

15 MR. AGNIFILO: I think what will happen in practice  
16 is trials take on a certain -- rules are different sometimes  
17 trial to trial, and trials take on certain protocols as you  
18 go. What I'm hoping happens here is I give this to your  
19 Honor, your Honor might say I have no opinion. You run your  
20 risk, Mr. Agnifilo. You're a big boy, it's your decision and  
21 you live with your decision; or you can say, it's my view,  
22 it's this instead of this. Then I know -- then I don't have  
23 to do it a second time.

24 But here's the point. The point is if I weren't  
25 cautious, I would just do it all on cross and let you preclude

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1 me or try to and then I'd have a great due process argument or  
2 a Sixth Amendment argument that I didn't get to do  
3 cross-examination. I don't want to do that. That's exactly  
4 what I'm not doing. So what I'm trying to do is the right  
5 thing and I'm alerting everybody to the issue and I'm telling  
6 your Honor I'll give it to your Honor beforehand and I'll give  
7 it to the Government at the end of direct. And if there's  
8 some concern that they have, oh, you know what can you not use  
9 this, can you not use this? I'll do it. I'm trying to work  
10 with everybody. I'm not trying to put them on my team. I'm  
11 trying to be appropriate and responsible and accommodating.

12 And so, that's my proposal. And honestly, your  
13 Honor, when -- as we go, it'll become clearer how this court  
14 in this case will delineate the distinction between what's  
15 impeachment and what's the defense case-in-chief and I will  
16 abide by the Court's direction.

17 MS. PENZA: Your Honor, the Government's position is  
18 that if the defendant intends to introduce evidence in its  
19 case-in-chief through cross-examination of our witnesses that  
20 they should be producing that now and that's the Government's  
21 position on this. The only reason not to do that is  
22 gamesmanship, and that is not now the trial is supposed to  
23 operate and we haven't been operating that way. And if we do  
24 have to operate this that way, then this is not going to be an  
25 efficient process.

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1 MR. AGNIFILO: Judge, it's not the same. It's their  
2 witness; I have cross-examination. If I call the witness, if  
3 I call the witness, do you think the Government would tell me  
4 what their cross of that witness would be? Of course they  
5 wouldn't tell me what the cross of the witness would be.  
6 They're putting on witnesses, I get to cross them this is the  
7 way it's been done for 234 years. There is nothing different  
8 about this case. And no one had more trials than this court.  
9 I mean, this is exactly how it always goes. And I'm looking  
10 to do something different, I'm looking to break the  
11 traditional rule and say I'll give them the stuff before my  
12 cross. I think that's a major concession and I'm willing to  
13 give your Honor it before my cross, and I'm willing to give  
14 your Honor it beforehand, because you might have an opinion.

15 THE COURT: Because I ordered you to. That's why  
16 you're willing to give it to me, I just told you to do it.  
17 That's the difference.

18 MR. AGNIFILO: No, but, Judge, I am not conceding  
19 this is not my case in -- I'm not conceding this on my  
20 case-in-chief. This is absolutely not my case-in-chief in  
21 terms of what case-in-chief and what Rule 16 means. Rule 16  
22 does not mean cross-examination.

23 THE COURT: Okay. Your point has been made. Your  
24 point has been made.

25 MS. PENZA: Thank you, your Honor.

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1 THE COURT: And after tomorrow, we'll see where we  
2 are.

3 MR. AGNIFILO: Can I raise one other issue?

4 THE COURT: I can hardly wait.

5 MR. AGNIFILO: Okay, Judge. The experts.

6 The Government gave us expert notice on May 2nd.  
7 What I would like to do is I want to preclude the experts as  
8 being untimely.

9 I think your Honor initially had a date for experts  
10 in February, and I think these experts are untimely. But I'm  
11 also told that the experts would not be testifying until later  
12 in the case, so I'd like an idea of briefing schedule from the  
13 Court as when I can lodge my objections to the expert  
14 notifications.

15 MS. PENZA: Your Honor already ruled that if the  
16 Government submit by last Thursday that they would be timely.  
17 I think that should be denied on its face that they're timely,  
18 that the Government's disclosures are untimely.

19 THE COURT: Is that the only grounds?

20 MR. AGNIFILO: I think there's prejudice. I mean,  
21 the timeliness is related to prejudice. The reason we wanted  
22 expert disclosures in February is so we would have months to  
23 work on this very important part of the trial rather than  
24 getting expert disclosures, while we're getting our exhibits,  
25 while we're preparing for openings, while we're preparing for

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1 our first witnesses.

2 I mean, this is an agreed-upon schedule. They  
3 agreed to it. They agreed to a date months in advance. My  
4 question that I asked rhetorically is: What happen to the  
5 date? This is a big case. This is the United States  
6 Department of Justice, the Eastern District of New York. They  
7 forgot? It slipped their mind for months that they had an  
8 expert disclosure obligation?

9 THE COURT: All right. So that's your motion.

10 MR. AGNIFILO: That's my motion. But it's also I  
11 don't believe it's appropriate expert testimony and I think we  
12 need a Daubert hearing for both of them.

13 THE COURT: Oh, now we have to have a Daubert  
14 hearing?

15 MR. AGNIFILO: Right. Because they just gave us the  
16 notice three days ago.

17 MS. PENZA: We have no objection to having -- we  
18 don't believe that a Daubert hearing is necessary, so we think  
19 they should put in their papers. Neither of both of these are  
20 leading experts in their field, your Honor. This is the type  
21 of testimony that has been introduced in other cases; and so,  
22 we don't believe there will be a need for a hearing.

23 THE COURT: Why don't you put in your papers by  
24 Wednesday, put in your papers by Friday, I'll hold a hearing  
25 on Saturday. I don't have time. Saturday morning, 9:30,

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1 we'll have been a Daubert hearing. How is that? We can just  
2 do it.

3 MR. AGNIFILO: I'll be here, Judge.

4 MS. PENZA: Your Honor, I do have -- I have a  
5 personal -- my little brother is graduating from law school  
6 that day.

7 THE COURT: Another member of the family is going to  
8 be a lawyer?

9 MS. PENZA: Yes.

10 THE COURT: Congratulations.

11 MS. PENZA: Thank you. So we could not do it.

12 I'm already -- you know, it's difficult to already  
13 be away from the trial but I would like to not miss that, your  
14 Honor.

15 THE COURT: Try to work out a date for a Daubert  
16 hearing.

17 MS. PENZA: Thank you, your Honor.

18 I mean, we would ask that your Honor consider the  
19 papers first because there's going grounds Daubert hearing.

20 THE COURT: Your papers by Wednesday and your papers  
21 by Friday and we'll have other weekends when we can do it.

22 MS. PENZA: Thank you, your Honor.

23 THE COURT: I do evenings and weekends when I'm on  
24 trial so as you do.

25 Is there anything else for today? You all have

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1 copies of the trial schedule the dates and so forth, right?

2 MS. PENZA: I don't think we do.

3 MR. AGNIFILO: I don't think so.

4 THE COURT: We'll provide them before you leave  
5 today.

6 MR. AGNIFILO: Very good.

7 THE COURT: I'll also provide them to the -- I  
8 thought we put them up on ECF.

9 I guess we didn't. We'll also provide them to the  
10 Fourth Estate so the press will know. In addition, the second  
11 row on the left, second row outside the well on the right is  
12 seating for the Government and on the left will be seating for  
13 the defense.

14 MR. AGNIFILO: Thank you, Judge. We appreciate  
15 that.

16 THE COURT: And the last row will be for the general  
17 public. The first row will be for the media plus we have the  
18 overflow room.

19 If anyone has a smart watch, don't wear it for this  
20 trial, you know, go get a Thai mechanics, because I'm not  
21 allowing anything like that in the courtroom.

22 Furthermore, if you bring bottled water into the  
23 room I think we have cups, use the cups. Don't drink out of a  
24 bottle in the courtroom. And, of course, I don't allow coffee  
25 in the courtroom or any other type of drink than water. So



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1 are there any questions about how we're going to proceed?  
2 Something more?

3 MS. PENZA: Yes, your Honor. I'm sorry.

4 My understanding was that we were not sitting on  
5 Fridays are we now sitting on some Fridays.

6 THE COURT: Some Fridays. We're not sitting this  
7 Friday.

8 MS. PENZA: Yes, your Honor.

9 THE COURT: We're not sitting on the Friday before  
10 Memorial Day. But I think the in-between Friday we're going  
11 to sit.

12 MS. PENZA: Okay. I just wasn't sure whether we  
13 had.

14 THE COURT: I haven't ruled out Fridays.

15 MS. PENZA: Okay.

16 THE COURT: But I want -- the other thing is I want  
17 to see how quickly we get through the witnesses and the  
18 evidence as to whether it will be necessary to have Friday  
19 sitting in June because I'm worried that when we get into the  
20 middle of June if we're still going, that that may create some  
21 problems with a few of the jurors. I'll have to go back and  
22 look but there may be one or two jurors who have late-June  
23 travel plans for vacations.

24 MS. PENZA: Okay.

25 MR. AGNIFILO: Would your Honor be open to not

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1 sitting on Friday, the 17th, only because I've loaded these  
2 days with all my other matters and I have a federal sentencing  
3 where --

4 THE COURT: Who is the judge?

5 MR. AGNIFILO: It's Judge Furman in the Southern  
6 District.

7 THE COURT: Do you want me to call him?

8 MR. AGNIFILO: You can call him, but we had to  
9 cancel it once because of something that happened --  
10 Judge Furman's situation.

11 THE COURT: Family. Yes, I understand.

12 MR. AGNIFILO: So we had to cancel it once and we  
13 have people flying in from Ireland and they have tickets.

14 THE COURT: What Friday is this.

15 MR. AGNIFILO: The 17th.

16 THE COURT: Of May.

17 MR. AGNIFILO: May 17th.

18 THE COURT: Let's see how we're doing. I don't  
19 know. Trials come before sentencings. I give a number of  
20 sentencings when lawyers are busy on trial. And I said don't  
21 make any commitments until July, so I think I said that before  
22 we even started this process. And you thought that was a  
23 great idea at the time. Well, not really, but you were  
24 willing to accept it.

25 MR. AGNIFILO: I'll be extra efficient.

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1 THE COURT: Well, we'll see. Anything else from the  
2 defense for today?

3 MR. AGNIFILO: Nothing from us.

4 MS. PENZA: No, your Honor.

5 THE COURT: All right. Tomorrow morning, 9:30.

6 Thank you very much.

7 MS. PENZA: Thank you.

8 MR. AGNIFILO: Thank you.

9 (Defendant exits from courtroom at 12:11 p.m.)

10 THE COURT: Was there something else.

11 MS. PENZA: Not necessarily for the record but I  
12 have a --

13 THE COURT: I don't want to do anything off the  
14 record.

15 MR. AGNIFILO: I apologize, your Honor.

16 THE COURT: And the defendant. I just don't want to  
17 do anything off the record at this point.

18 (Defendant enters the courtroom at 12:12 p.m.)

19 THE COURT: Briefly. Please sit down. Everyone can  
20 sit down.

21 MS. PENZA: Very briefly, your Honor.

22 In the back of the courtroom is Randall Carter, he  
23 is going to be helping us with graphics. And the CSOs were  
24 hoping you would grant permission for him to bring in his  
25 computer when he is working with us. And so, we just wanted

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1 to introduce him to the Court.

2 THE COURT: Well, he's part of your --

3 MS. PENZA: Yes, your Honor.

4 THE COURT: -- organization and he's helping you  
5 with technical issues.

6 MS. PENZA: He is part of a separate organization  
7 but he is working with -- he is contracted with the Department  
8 of Justice for this.

9 THE COURT: Any objection?

10 MR. AGNIFILO: No, your Honor.

11 THE COURT: That's fine.

12 MS. PENZA: Thank you, your Honor.

13 THE COURT: So ordered.

14 Anything else?

15 MS. PENZA: No, your Honor.

16 THE COURT: So you only have four people at the  
17 Government's table.

18 MS. PENZA: Terri Carby, our paralegal, will also be  
19 at the Government's table.

20 THE COURT: That's five people. Give me the list of  
21 five and your group.

22 MS. PENZA: Four plus Mr. Ranieri.

23 THE COURT: Okay. Very good.

24 Thank you, everybody.

25 MS. PENZA: Thank you.

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1 MR. AGNIFILO: Thank you.

2 (Defendant exits from courtroom at 12:13 p.m.)

3 (WHEREUPON, this matter was adjourned to May 6,  
4 2019, at 9:30 a.m.)

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